In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78 - 1157

ROBERT M. DUPAS, JR.,
Petitioner,

versus

CITY OF NEW ORLEANS, TRAVELERS INSURANCE COMPANY, and WILLIAM O. BROWN,
Respondents

REPLY BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO. 78-1157

ROBERT M. DUPAS, JR.,
Petitioner,

versus

CITY OF NEW ORLEANS, TRAVELERS INSURANCE COMPANY, and WILLIAM O. BROWN,
Respondents.

REPLY BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

Respondents, City of New Orleans, Travelers Insurance Company and William O. Brown pray that the writ of certiorari sought by petitioner, Robert M. Dupas, Jr., to issue from the Supreme Court of the United States to review the opinion and judgment of the Louisiana Court of Appeal, Fourth Circuit, rendered June 30, 1978, and the denial of petitioner's Petition for Writ of Certiorari to the Supreme Court of Louisiana dated October 26, 1978, be refused and denied.

QUESTIONS PRESENTED

I. Whether petitioner heretofore raised or asserted any federal issue or question in the state court proceedings prior to petitioning the Supreme Court of the United States to

issue a writ of certiorari herein.

II. Whether the judgment of the Louisiana Court of Appeal, Fourth Circuit is supported by independent and adequate grounds under Louisiana state law as to preclude the view by the Supreme Court of the United States.

III. Whether the award of damages to petitioner by the Louisiana Court of Appeal, Fourth Circuit, is fair and adequate and therefore not violative of the provisions of the Fourteenth Amendment of the United States Constitution.

IV. Petitioner is precluded from pursuing any further appellate process by reason of his having accepted and received monies totally and completely satisfying the judgment of the Louisiana Court of Appeal, Fourth Circuit and his counsel having executed certificates of satisfaction.

STATEMENT OF THE CASE

The relevant facts as set forth in petitioner's statement of the case in his petition for writ of certiorari is correct and accurate, except that the total award, exclusive of expert witness fees, of the Louisiana Court of Appeal, Fourth Circuit, is $173,511.60, not $172,461.60 as indicated in petitioner's statement of the case.

ARGUMENT

I.

The extent of the United States Supreme Court's power to review decisions of state courts is set forth in 28 U.S.C.A. § 1257:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) . . .
>
> (2) . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Supreme Court has rigidly adhered to the premise that federal constitutional issues raised for the first time on review of state court decisions will not be considered. *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161 (1969); *Safeway Stores, Inc. vs. Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334, 79 S. Ct. 1196 (1959); *State Farm Mutual Automobile Insurance Co. vs. Duel*, 324 U.S. 754, 65 S. Ct. (1945); *Murdock v. City of Memphis*, 20 Wall. 590, 22 L. Ed. 429 (1875). Thus, a federal question will be reviewed by the Supreme Court only if it has been first drawn in question before the state court.

In the present case, it seems highly unlikely that the pe-

titioner properly asserted his federal constitutional claim to the Louisiana Supreme Court. A survey of the petitioner's pleadings indicates that the only references to any "federal constitutional issue" are found in four footnotes added to the text of the petition for a writ of certiorari to the Supreme Court of Louisiana. These footnotes contain a cursory legal conclusion that the decision of the Louisiana Court of Appeal, Fourth Circuit,"also" violate the Fourteenth Amendment of the Constitution of the United States. This contention is unsupported by any argument made or authority cited in the main body of the petition.

The Supreme Court of the United States has unequivocally held that such cursory conclusions are not sufficient to constitute the assertion of a federal question to a state tribunal. *Harding v. Illinois*, 196 U.S. 78, 25 S. Ct. 176 (1904). In that case, the petitioner sought review of a state court judgment and as basis for his claim asserted that his federal constitutional rights had been violated. In reviewing the petitioner's pleadings at the state level, the Supreme Court found only two instances wherein the petition raised federal constitutional issues. In both instances the references amounted to mere conclusive statements that a state statute violated the Constitution of the United States. The issues thus raised by the petitioner in the *Harding* case, *supra*, closely resemble those raised by the petitioner in the case *sub judice*. In dismissing the petitioner's writ in *Harding, supra*, the Supreme Court concluded that such cursory statements unsupported by authority or argument were not sufficient to support a contention that federal constitutional issues had been raised before the State tribunal and thereby decided upon. Based upon the court's holding in *Harding, supra*, the Supreme Court should deny the petitioner's writ in

the present case.

II.

The Supreme Court's jurisdiction to review state court cases that involve federal questions has been limited by a number of rules that have been developed since the enactment of Section 25 of the First Judiciary Act in 1789. One such rule is commonly referred to as the "independent state ground" rule. Basically, the sum and substance of that rule is that the Supreme Court will not review a federal question if the state judgment is supported by independent and adequate grounds under state law. Wright, Miller, Cooper, Gressman. *Federal Practice and Procedure*, Volume 16. § 4019. Thus if there is state law sufficient to support the decision of the highest state court, the Supreme Court should refuse to review that decision.

This doctrine was elaborately discussed by Justice Miller in *Murdock v. City of Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875). The rule was stated in somewhat different terms by the court in *Henry v. State of Mississippi*, 379 U.S. 443, 85 S.Ct. 564 (1965) as follows:

> "Under the view taken in Murdock of the statutes conferring appellate jurisdiction on this Court, we have power to review judgments on questions of state law. Thus, the adequate nonfederal ground doctrine is necessary to avoid advisory opinions." 85 S. Ct. at 567.

No case has been found wherein the Supreme Court refused to review a state court decision regarding damages.

However, in view of the fact there must be some support in Louisiana law for the Louisiana Supreme Court's refusal of the petitioner's writ in this case, the Supreme Court should apply this doctrine and deny the petitioner's writ for certiorari.

III.

Petitioner contends that the Louisiana Court of Appeal, Fourth Circuit, did embrace and apply a so-called "ordinary man" concept in assessing damages herein rather than adhering to a long standing rule in the jurisprudence of Louisiana that the courts consider the unique and peculiar circumstances of each individual case in deciding damages. Paradoxically, plaintiff both misconstrued the context of the single "ordinary man" reference in the opinion of the Court of Appeal, as well as the mode and method of the Court of Appeal in awarding damages herein. Petitioner expends a great deal of effort and verbage in his brief in attacking the examination and exploration of the circumstances of the background and life style of petitioner by the Court of Appeal in its damage evaluation, thence and thus proceeding full circle in arguing that the Court should have in fact looked upon petitioner as any ordinary man, ignoring the type of person he was and the jaded life style he pursued.

It was precisely in this context that the Court of Appeal made the "ordinary man" reference, that is, pointing out that prior to the accident, petitioner was anything but an ordinary productive and responsible citizen. In Louisiana, damages in personal injury cases are strictly compensatory. Thus the Courts have no choice but to examine the pre-injury and post-injury circumstances of each personal injury claimant in

an effort to determine damages that will adequately and properly compensate him for his suffering and deprivations causily resulting or occasioned by the tortuous event.

Respondents concede petitioner indeed suffered a serious head injury from which he has significant residuals. Dr. David G. Kline, petitioner's initial attending neurosurgeon, described same as a closed head injury with contused central brain lobe. Dr. Kline carried out a partial lobectomy of the left temple lobe, removing the most swollen and contused portion of the brain which amounted to eight to ten per cent of the brain overall. Tr. Vol. II, pgs. 24, 29, 34, 38. His residuals have been detailed as weakness and awkwardness of the right arm and right leg, expressive aphasia (speech impediment), some degree of intellectual and memory impairment, and certain personality changes (personality flattening). On the other hand, the medical evidence shows to an equally definitive degree that plaintiff made a remarkable recovery from his injury, that he is physically and mentally functional, and continued to exhibit improvement right up to the time of trial. The ultimate opinion of Dr. Kline was that petitioner was probably able to carry out a desk job in a clerk's capacity or do cleaning work, and would probably do well if he in fact had some type of menial job. Tr. Vol. II, pgs. 25-27, 34-40, 46. This was also the opinion of Dr. Patricia Cook, a neurologist who attended petitioner commencing shortly after his surgery by Dr. Kline and throughout his initial primary rehabilitative regimen. Tr. Vol. IV, pgs. 419-424, 430. Significantly Dr. Kline made no mention in the entire course of his testimony of the petitioner's suffering any degree of pain or discomfort by reason of his injury, or that he prescribed any medication for pain at any time petitioner was under his care. Dr. Cook specifically

stated that while she was seeing the claimant he was not in pain and she seriously doubted that he experienced much if any pain following brain surgery. Tr. Vol. IV, pg. 415.

The claimant was also seen and evaluated by Dr. Raeburn Llewellyn, neurosurgeon, and Dr. Max Johnston, a meurologist;psychiatrist. Dr. Llewellyn saw the claimant October 18, 1974 and just prior to trial on March 18, 1976. His findings were basically those described by Dr. Kline and Dr. Cook (Vol. IV, pgs. 520-524, 527-528), though he was a bit more pessimistic in his view as to whether claimant could hold down a job. Tr. Vol. IV, pg. 526. It should be noted that on the two occasions Dr. Llewellyn saw the petitioner, he had no complaints of headaches, dizziness or other health problems and reported that he was eating and resting well. Tr. Vol. IV, pgs. 528-529.

Petitioner saw Dr. Johnson on November 18, 1974, on June 9, 1975 and on March 22, 1976. His findings and opinion basically corresponded to those of Drs. Kline, Cook and Llewellyn. Tr. Vol. III, pgs. 268-276.

Most interesting are the results of certain post-accident psychological and intellectual tests administered to petitioner as compared to similar pre-accident evaluations petitioner underwent. One Charles Kilbert of the Basic Education and Department of Continuing Education of the Orleans Parish School Board was called to testify on behalf of plaintiff. Mr. Kilbert offered testimony regarding the General Educational Developmental certificate awarded petitioner towards his obtaining a high school equivalency diploma. The record shows that at age 15 or 16, petitioner left grammar school after having repeated the sixth grade two or three times, and

having just commenced the seventh grade. Subsequent thereto, the only additional formal education he had consisted of a two month course at Colton Junior High School preparatory to taking the G.E.D. test in December, 1972; a one month math course at Delgado Vocational College in July and August, 1972; and a four month course in drafting at Delgado Vocational School from August to December, 1972. See exhibits Def. I, II, III; exhibits P-15 through 17 and P-22; Tr. Vol. II, pgs. 137-138. The record further shows that in early 1965, while serving a term in the Louisiana State Penitentiary at Angola for burglary, petitioner underwent both intelligence (I.Q.) and achievement grade level testing. His intelligence I.Q. rated at 80 or at the eleven percentile level and his verbal I.Q. at 107 or at the 67 percentile level giving him an overall I.Q. score of 97. On achievement testing, his reading score was converted to an eighth grade, eighth month rating; his spelling to a sixth grade, sixth month rating; and his arithmetic to a sixth grade, second month rating. These results gave him an overall sixth grade level achievement score. Exhibit Def. II.

Subsequent to the two month preparatory course for his GED test, but before taking the GED, claimant took a qualifying test known as the California Achievement Test. Mr. Kilbert testified that on this test he scored an overall grade equivalency of 13, or first year in college. He had a reading placement of 13th grade; arithmetic placement of 12th grade, third month; and language placement of 13th grade, fourth month. Tr. Vol. II, pgs. 138-141. Subsequently, petitioner took the GED test which consists of five parts and is graded under a most peculiar method. Tr. Vol. II, pgs. 125-130. Rather than undertaking to interpret and corrolate his GED scores, it need only be pointed out that in three

of the five test areas, Dupas scored in the lower fifty percentile of the test takers nationwide. Tr. Vol. II, pgs. 128-129, 141-142. Mr. Kilbert was called upon to compare petitioner's test results against the optimum ranges of each test, he was forced to admit he was not a tester, scorer or interpreter, and was not able to give such corrolation. Tr. Vol. II, pgs. 143-144.

Also testifying in this area was Robert McFarland, a clinical psychologist, who on two different occasions, tested and evaluated petitioner. The first of these testings was carried out on October 30 and November 5, 1974. Mr. McFarland was of the opinion that petitioner exhibited brain damage level scores on such tests as seashore rhythm, speech and sentence perception. On the other hand, his intelligence or I.Q. overall score was 90 (based on a verbal score of 88 and a performance of 94) which fell in the normal intelligence range. In achievement testing,converted to grade level, petitioner had a reading score of seventh grade, ninth month, spelling fourth grade, sixth month, and arithmetic sixth grade, first month.

The second group of testings by Mr. McFarland were carried out on March 25, 1976. On this occasion, petitioner had a slightly lower intelligence score than two years' prior, but his achievement scores of eighth grade, third month reading, fifth grade, fifth month spelling, sixth grade, first month arithmetic, were higher.

Putting aside momentarily the California Achievement Test results, it is clear that in the area of intelligence quotion and achievement testing there is little if any significant difference in the levels attained by petitioner when he was

tested while incarcerated in Angola Prison in 1965 and those which he attained on two different series of testings by Mr. McFarland in 1974 and 1976, following the accident which is the subject of this litigation. It is thus clear that the claimant's head injury has resulted in little or no reduction intellectually or in the area of mental achievement on the part of petitioner. As to the results of the California Achievement Test, Mr. McFarland noted and commented upon the significant disparity between such and the levels petitioner attained on the McFarland-administered testings. Tr. Vol. IV, pgs. 458–460. However, when Mr. McFarland became fully appraised, while on the witness stand, of the degree of petitioner's formal education prior to taking the achievement test while in prison in 1965, and the scores he made on the tests he took in prison, and of the two months' special preparation petitioner underwent before taking the California Achievement Test, Mr. McFarland openly questioned the validity of the latter. Tr. Vol. IV, pgs. 466-467. He went on to clearly indicate that the petitioner's test scores while in prison and those on the tests administered by him (McFarland) since the time of petitioner's injury were consistent and in line with the degree and extent of petitioner's academic background. Tr. Vol. IV, pgs. 468-469. Finally, Mr. McFarland testified that inasmuch as Dupas had been purposefully and specifically tutored both for the qualifying California Achievement Test and the subsequent GED test, that such undoubtedly had a significant influence in the scores Dupas attained thereing. Tr. Vol. IV, pgs. 475-477.

Respondents concede for purposes of argument that residuals of the nature and degree petitioner has from his injury might be expected to radically effect the life style and output of an average law-abiding, productive, socially integrated

and responsible citizen. However, as respondents have heretofore suggested, the record shows that prior to the accident of October 15, 1973, Robert M. Dupas, Jr. was the literal antithesis of such average citizen.

After repeating the sixth grade two or three times, petitioner finally left school permanently some time during the course of the seventh grade at age fifteen. See exhibits Def. II and III. In 1964, he was arrested for vagrancy. In September of the same year, he was arrested for simple burglary, a charge on which he was later convicted and sentenced to Angola Prison in 1965. See Exhibit Def. II.

The records of the Southeast Louisiana Mental Hospital in Mandeville, Louisiana, were subpoenaed and introduced into evidence as Exhibit Def. III. These show that petitioner's mother, during an interview after petitioner's admission to that institution in late March, 1969, disclosed that petitioner had been mentally ill since age 13, having become antagonistic and undisciplined at age 10. He had developed feelings that people were leechs, and from age 13 had led an unhappy existence. She had often considered seeking help for him, but he threatened suicide each time it was suggested.

Petitioner's wife, Marian, was also interviewed at the Mandeville Hospital. She related that petitioner had been abusive to her throughout their marriage, most recently having split her head open with a gun at the same time attempting to kill their two year old child. He had no interest throughout their marriage, keeping company with criminal types and never holding a job more than six months. As a result they had lived in abject poverty throughout their marriage, often being without electricity or gas. Petitioner's

wife went on to say that petitioner underwent protracted periods of depression, often commencing just after New Year's and lasting midway through the ensuing year. He raved daily, most frequently at midday and late afternoon. He was unhappy, felt inadequate and frequently threatened suicide.

The Mandeville Hospital records further show that while petitioner was interned there, a detainer was placed on him at the request of the Jefferson Parish, Louisiana, authorities for possession of stolen property.

The diagnosis on Dupas at Mandeville Hospital was that he was a paranoic-depressive with antisocial traits and drug dependent. Petitioner himself admitted while hospitalized that he lacked ambition, had groundless suspicions about his wife, and for years had stolen and burglarized. He exhibited sociopathic traits with depression and paranoia. It was suspected by those who evaluated him that the recent incident involving his wife and child constituted a psychotic episode. He was discharged from the hospital May 16, 1969, still on medication, and placed in the hands of the St. Tammany Parish authorities for transfer to Jefferson Parish on the stolen property charge. On discharge, he was to continue his medication and his prognosis was classified as "guarded". See Exhibit Def. III.

Petitioner's work and earnings records between the time he left grammar school at age 15 to the time of his accident are by any standard a disgrace. The earliest employment he seems to have had was at Avondale Shipyards, Inc. The Avondale records offered in evidence (see Exhibit P-21) showed that from April 12, 1962 to January 29, 1963, and

April 29 to June 21, 1963, he worked there as an electrician's helper. At the end of the first period he was discharged for having been absent from work for several months. At the end of the second period, he quit for alleged illness. The Avondale records also contain a notation dated May 23, 1963 that petitioner was not a desirable employee and should not be rehired. Nonetheless, several years later he worked one further brief period at Avondale, this from June 26 to August 7, 1973, once again as an electrician's helper. He quit purportedly to return to school. See Exhibit P-21.

Petitioner's tax returns for the years 1966 through 1969, both inclusive, and for 1972 and 1973 were introduced and received in evidence. See Exhibits P-37 through P-42. These showed that in 1966, petitioner earned a total of $1,085.16 at four different places of employment; that in 1967, he earned $1,335.95 at three different places of employment; that in 1968, he earned $1,939.78 at one place of employment; that in 1969, he earned $2,234.36 in one place of employment; that in 1972, he earned $1,071.25 at two different-places of employment; and that over the nine and a half months of 1973 preceding his accident of October 15, petitioner earned $3,518.03 at three different places of employment.

While petitioner's wife, Marian, and his father, Robert, Sr., attempted in their testimony to minimize petitioner's problems as well as their own problems with petitioner prior to his admission to the mental hospital in Mandeville, and also attempted to portray petitioner as having "turned over a new leaf" following his discharge therefrom, the record supports them in neither instance. Petitioner's work and wage records before he was institutionalized in Mandeville in 1969 clearly

placed Dupas and his family at the sub-poverty level. Following his release from the Mandeville hospital, he worked part of 1969 and part of 1970 as a truck driver at a maximum attained wage of $2.10 per hour. When he left this employment in July, 1970, it was for alleged personal reasons, and he did not indicate that he had any other employment. Tr. Vol. III, pgs. 259, 263-267; exhibit P-19. Apparently for the remainder of 1970 and the whole of 1971, he was unemployed, there being no evidence of any employment or any earnings for that period. In 1972, he worked briefly at Cozo's Electric earning $1,052.00, and apparently only a matter of a few hours at Wallace Drennan,Inc. where he earned $19.75. In 1973, he continued briefly at Cozzo's, but left there to go to work at Halter Marine where he was employed less than four months earning $2,061.69. Exhibits P-20, P-41, P-42. After leaving Halter, he returned for approximately five weeks to Avondale Shipyards, earning $1,120.34. He terminated at Avondale Agusut 7, 1973. Exhibit –21. When he left Avondale on this occasion, he indicated it was because he was returning to school, but he did not in fact do so nor did he obtain any other employment up to the time of his accident some two and a half months later. Exhibit P-21; Tr. Vol. V, pgs. 35, 43, 44. When he was injured on October 15, 1973, neither he nor his wife were employed. Tr. Vol. V, pgs 44-45. While Dupas was employed for part of 1970, he had by August or September of that year (if not earlier) resumed his drug habit. His pre-accident record at Charity Hospital of Louisiana at New Orleans (see Exhibit Def. I) reflects that in September, 1970, petitioner was hospitalized for viral (serum) hepatitis which he contracted when he borrowed an unsterile syringe from a friend some six weeks earlier for a heroin injection. The friend had apparently exhibited signs and/or symptoms of the disease at the time

petitioner had borrowed the needle from him.

The troubles between Dupas and his wife clearly continued through the early 1970's. They went through further periods of separation, one being of six months duration in 1972. Tr. Vol. V, pgs. 29, 40. The same basic underlying problem existed for them, that being her continued and his periodic unemployment and the resultant lack of finances. Tr. Vol. V, pgs. 40-45. Some insight into the type of irresponsible person petitioner was and had always been prior to the accident can be gleaned from the testimony of his wife, Marian, in respect to petitioner's acquisition of the motorcycle he had ridden to the scene of the accident involved herein. That motorcycle had been purchased in May, 1973 with funds realized from the sale of bonds Mrs. Dupas had inherited from her father. Tr. Vol. pgs. 49-50. Taking into consideration that from the time petitioner was discharged from the Mandeville mental hospital in May, 1969, to his purchase of the motorcycle in May, 1973, the combined income of the Dupas' averaged somewhere between $1,000.00 and $1,500.00 per year, as well as their general circumstances and mode of life, the utilization of the funds realized from the sale of the inherited bonds for the purchase of such a non-essential luxury item as a motorcycle does outrage to any concept of family or individual responsibility.

In summary, the evidence overall portrayed petitioner from a very early age to the time of his accident as a consistently erratic, irresponsible, criminally prone, violent, drug dependent, disillusioned, depressed, paranoic, ambitionless and nonproductive man-child. While the accident of October 15, 1973 resulted in a serious, partially disabling injury, there is no evidence that he has experienced significant or prolonged pain and suffering, physically or mentally, and there is ample evidence that he is a much less truculent, more facile and easier to deal with individual, albeit due to his injury.

Admittedly a dispute exists between the medical and rehabilitative experts who testified as to whether petitioner is now able to undertake any form or means of gainful employment, but respondents submit that this controversy arose by and between petitioners' own witnesses, not any called or relied upon by respondents. Consequently, petitioner has failed in his burden to establish by preponderance of the evidence that he is physically and/or mentally incapable of employment. *Viator vs. Gilbert*, 216 So. 2d 821 (La. Sup. Ct., 1968); *Edwards v. Sims*, La. App. (4th Cir.) 1974, 294 So. 2d 611.

Respondents respectfully submit that the award of $50,000.00 in general damages to petitioner is not merely adequate, but generous in light of the overall circumstances and the hereinafter cited case authorities from the Louisiana jurisprudence. The medical evidence is conclusive that petitioner suffered little if any pain or discomfort from his injury. While there is evidence that claimant realizes or is cognizant that the accident has resulted in some degree of mental deficiency on his part, there is absolutely no evidence that this realization is agonizing or tormenting to him, or causes any emotional reaction whatsoever. Insofar as any claim for loss of cohabitation or companionship with his wife and children, the evidence is abundant that claimant's marriage was an on again, off again relationship, and that he had little or no interest in being with or caring for his family prior to the accident. There were long periods of separation between he and his wife, and even during those periods

when they were together the association produced more combat than comfort.

Petitioner's contention that the award of $104,249.17 for impairment of future earning capacity is inadequate is equally baseless. The Court of Appeal based such award on annual assumed earnings of $4,464.98. The record shows that in no year of his life did petitioner ever have earnings approaching such figure, and in most years he didn't earn even half that amount. Respondents thus submit that the award by the Court of Appeal to petitioner for loss or impairment of future earning capacity was more than adequate.

The cases submitted herein below by respondents represent an exhaustive effort to uncover and cite to this Honorable Court recent decisions wherein the injuries and residuals are at least as serious and enduring and the damages as extensive or more so as those suffered by and sustained to petitioner herein.

In *Guidry v. Canal Insurance Company*, La. App. (1st Cir.) 1975, 313 So.2d 860, plaintiff was injured in a bus accident. His injuries consisted of a compression fracture of the 12th thoracic vertebra with accompanying low back strain and low back tissue damage, and a fractured clavicle or collarbone. His pain was severe and his convalesence was complicated by the development of paralytic ileus, a condition where the intestinal tract ceases to function and the plaintiff had to be fed intravenously and waste products of his system removed through tubes inserted in his body. Plaintiff left school in the third grade at age 14 and later completed his education in the service. He completed a vocational training course in carpentry and pursued this avocation until the time of his accident in 1971. At that time he was 49 years of age. As a man of limited intelligence, his capabilities were measured by and limited to physical achievement. His injuries prevented his normal physical expressions which in turn resulted in severe mental depression. Being incapable of earning by reason of his limited mental resources and being unable any longer to perform the physical labors for which he was trained and experienced, plaintiff suffered severe economic loss. The record shows that in 1970, the year preceding his accident, plaintiff earned $8,263.00 and in 1971 up to the time of his injury on September 24, his earnings were $7,168.00. The Louisiana Court of Appeal, First Circuit, affirmed the trial court's total award of $79,806.90, this including past and future lost wages of $64,140.00.

The case of *Howard v. Scandalito*, La. App. (4th Cir.) 1976, 333 So.2d 657, involved personal injury claims of both a husband and a wife. The injuries suffered by the husband were similar to those suffered by Dupas herein. These included organic brain damage, brain disfunction and implied brain damage. These left plaintiff nearly senile, not oriented to date or time, not able to do simple addition or subtraction, weakness on the right side of his face, severe depression, increased loss of function of the frontal lobe of the brain, emotional difficulty and personality problems. Plaintiff had suffered a prior cerebral concussion affecting the left side of the brain and the second accident caused a moderate to severe aggravation of the decreased brain functioning he had experienced therefrom. Plaintiff suffered serious impairment of his intellectual capacity and was considered totally unemployable. The Louisiana Court of Appeal, Fourth Circuit found that the total award of $100,000

to the plaintiff husband was not excessive but should be reduced by $50,000 due to the involvement in the overall mental picture of the effects of the earlier cerebral concussion.

In the case of *Watts v. Town of Homer*, La. App. (2d Cir.) 1974, 301 So.2d 729, a 12-year old girl was seriously injured by the collapse of a swing on town property. Her injuries included a fractured skull, severely swollen brain with brain edema and bruising, high fever and damage to the lower portion of the brain. The left side of her body was partially paralyzed and she had recurring convulsions. Brain surgery was performed to check for blood clots. The evidence showed that she was a normal child for her age prior to the accident. However, she was subsequently found to have an I.Q. of 50, recurring convulsions, paralysis and weakness of the left side, unable to perform any type of chores, and required support for the rest of her life, with continuous supervision and with probable institutionalization along with frequent medical attention and medication. The trial court award of $250,000.00 was reduced to $150,000.00 by the Louisiana Court of Appeal, Second Circuit, which felt there was no accurate way to assess any possible future loss of earnings or reduction in life expectancy.

In *Smolinski v. Taulli*, La. App. (4th Cir.) 1974, 285 So.2d 577, writ refused 1974, a 19-month old child suffered severe brain injury and permanent brain damage from a fall from the landing of an apartment building stairway. As a result, the child became mentally deficient, with a dull or below average mentality. Her attending neurosurgeon testified that her problem was more in the integrated function of the brain rather than simply motor control which might cause paralysis, and that the trouble lay in the child's ability to learn, speak, talk, ability to think and perform, and emotional behavior. Interestingly, the *Smolinski* case followed the same judicial course as the instant case, the trial court finding in favor of the defendant, the Court of Appeal affirming and the Louisiana Supreme Court reversing and remanding to the Court of Appeal for fixing of damages. In *Smolinski* the Court of Appeal awarded $75,000 in general damages and $282.75 special damages.

In *Wright v. Romano*, La. App. (1st Cir.) 1973, 279 So.2d 735, writ refused 1973, a 14-year old girl suffered a comminuted fracture of the pelvis as well as fractures to the right scapula and the neck of the right humerus and multiple fractured teeth. She also suffered a severe cerebral contusion. As a result of the pelvic fractures she had a 10% permanent partial disability of the body as a whole, with a 15% limitation of movement in the right hip. As a result of the cerebral contusion she sustained permanent personality changes and mental deficiencies. Prior to the accident, she was described as a normal, healthy individual, but afterwards, she was found to have below average mental capacity, with a distinct possibility of post-traumatic epilepsy existing. A total award of $85,000.00 was made in this case.

The case of *Kline v. Ware*, La. App. (1st Cir.) 1973, 271 So. 2d 587, involved a 21-year old female who was a bride of two weeks when she was injured in an automobile accident October 27, 1968. Her injuries included contusion of the right lung, a fracture of the ramus of the left pelvis and a fracture of the transverse process of the fourth lumbar vertebra, loss of profusion of her kidney, a severe contusion of the cerebrum, brain stem and a possible intracranial hem-

orrhage. She remained in critical condition for a period of six weeks and her convalescence was described as a slow and painful process. Her residuals included retrograde amnesia, an unusual gait, and the possibility of future seizures. Her combined injuries resulted in the opinion of her attending physicians in a 25% disability of the body as a whole. There was no doubt that her lifestyle would be forever altered by the injuries. The Court of Appeal, First Circuit, reduced a $95,000 award by the trial court to $60,000 deleting an allowance for her loss of earning capacity. At the time of the accident, the plaintiff had recently left college to be married, but intended to return to pursue a degree toward becoming a commercial artist. The Court felt that an allowance for a reduction of earning capacity was too speculative under the circumstances.

Finally, in *Wood v. State Department of Highways*, La. App. (3rd Cir.) 1976, 338 So.2d 739, writ refused 1977, plaintiff, a 22-year old male, suffered serious and permanent disabling injuries in a motor vehicle accident. He was unconscious and on the critical list several days. He sustained a brain stem injury causing seizures and convulsions; contusions over his lower extremities, a fracture of the left elbow, and perineal nerve palsy resulting in a drop of his left foot, requiring a brace. During hospitalization he developed an ulcer which required plastic surgery. By hospital discharge his memory recall was very poor. He was considered totally disabled from returning to his occupation as a truck driver. In this instance the Court of Appeal found that the total award of $120,179.57 such including medical expenses of $10,179.57, lost earnings of $10,000 and $100,000 general damages was adequate.

IV.

Following the denial by the Louisiana Supreme Court of the petitioner's petition for writ of certiorari, petitioner, through his counsel, accepted and received monies from Travelers Insurance Company and the City of New Orleans, fully and completely satisfying all parts of the judgment of the Louisiana Court of Appeal, Fourth Circuit. His counsel executed certificates of satisfaction both in respect to Travelers Insurance Company and the City of New Orleans (see appendices A-1 and A-2), and these were filed into the record of the case and the docket marked satisfied. Respondents therefore submit plaintiff is now precluded from seeking a further appellate remedy herein and his petition for writ of certiorari to this Honorable Court should therefore be refused and denied.

CONCLUSION

By simply making cursory, one sentence footnote references to an alleged violation of the Fourteenth Amendment of the United States Constitution in his petition for writ of certiorari to the Louisiana Supreme Court, petitioner has not sufficiently heretofore raised any federal question or issue. Therefore, petitioner's petition for writ of certiorari to this Honorable Court should not be considered.

Further, the Louisiana Court of Appeal, Fourth Circuit, based its judgment on damages on adequate and independent grounds under Louisiana state law, and this Honorable Court should not undertake to revise such judgment and should therefore deny the petition for writ of certiorari of petitioner.

Further, that the rationale and basis of the judgment of the Louisiana Court of Appeal, Fourth Circuit, underlying its award of damages to petitioner are valid and correct, and there has been no violation or deprivation of any rights to which petitioner is accorded under the United States Constitution, particularly the Fourteenth Amendment thereof.

Finally, that petitioner is precluded from seeking any further relief in respect to this litigation by virtue of the fact that he has accepted and received funds from or on behalf of respondents fully and completely satisfying the judgment of the Louisiana Court of Appeal, Fourth Circuit, and his counsel of record has executed certificates of satisfaction in evidence thereof and the docket has been marked satisfied.

Respectfully submitted by:

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Travelers Insurance Company
and William O. Brown

CERTIFICATE

I certify that I have served the foregoing reply brief for respondents, City of New Orleans, Travelers Insurance Company and William O. Brown to the petition for writ of certiorari of Robert M. Dupas, Jr. to the Supreme Court of the United States upon said petitioner by mailing or delivering three copies thereof to Gerald P. Aurillo, Attorney at Law, 3332 North Woodlawn Avenue, Metairie, Louisiana 70002 on the 21st day of February, 1979.

THOMAS P. ANZELMO, SR.

APPENDIX A

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 581-139 DIVISION "B" DOCKET NO. 4

ROBERT M. DUPAS, JR.

VS.

CITY OF NEW ORLEANS, ET AL.

Filed: Jan. 3, 1979

FILED: DEPUTY CLERK

CERTIFICATE OF PARTIAL SATISFACTION OF JUDGMENT

I, as attorney of record for plaintiff, Robert M. Dupas, Jr., acknowledge and certify that that portion of the judgment rendered in the above entitled and numbered cause by the Court of Appeal, Fourth Circuit on or about June 30, 1978, for which defendants, the City of New Orleans and William O. Brown, are responsible and liable, that is, the sum of ONE-HUNDRED NINETY-ONE THOUSAND, ONE-HUNDRED SIXTY-THREE AND 32/100 ($191,163,32) DOLLARS, has been fully paid and satisfied.

New Orleans, Louisiana, this 29th day of December, 1978.

s/ Gerald P. Aurillo
GERALD P. AURILLO
3332 N. Woodlawn Avenue
Suite 103
Metairie, Louisiana 70002
Attorney for Plaintiff,
Robert M. Dupas, Jr.

SATISFACTION OF DOCKET

The above indicated portion of the aforesaid judgment has been fully satisfied and the sum above mentioned received by me, as attorney of record for and on behalf of plaintiff, Robert M. Dupas, Jr.; now, therefore, the Clerk of the Civil District Court is hereby authorized to mark the docket "satisfied" to the extent thereof as to defendants, the City of New Orleans and William O. Brown.

s/ Gerald P. Aurillo

GERALD P. AURILLO
3332 N. Woodlawn Avenue,
Suite 103
Metairie, Louisiana 70002
Attorney for Plaintiff,
Robert M. Dupas, Jr.

APPENDIX B

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 581-139 DIVISION "B" DOCKET NO. 4

ROBERT M. DUPAS, JR.

VS.

CITY OF NEW ORLEANS, ET AL.

Filed: Jan. 2, 1979

FILED: DEPUTY CLERK

CERTIFICATE OF PARTIAL SATISFACTION
OF JUDGMENT

I, as attorney of record for plaintiff, Robert M. Dupas, Jr., acknowledge and certify that that portion of the judgment rendered in the above entitled and numbered cause by the Court of Appeal, Fourth Circuit on or about June 30, 1978, for which defendant, Travelers Insurance Company, is legally responsible and liable, that is, the sum of THIRTY FOUR THOUSAND FIVE HUNDRED EIGHTY-FOUR AND 60/100 ($34,584.60) DOLLARS, has been fully paid and satisfied.

New Orleans, Louisiana, this 29th day of December, 1978.

s/ Gerald P. Aurillo
GERALD P. AURILLO
3332 N. Woodlawn Ave.,
Suite 103
Metairie, Louisiana 70002
Attorney for Plaintiff,
Robert M. Dupas, Jr.

SATISFACTION OF DOCKET

The above indicated portion of the aforesaid judgment has been fully satisfied and the sum above mentioned received by me, as attorney of record for and on behalf of plaintiff, Robert M. Dupas, Jr.; now, therefore, the Clerk of the Civil District Court is hereby authorized to mark the docket "satisfied" to the extent thereof as to defendant, Travelers Insurance Company.

s/ Gerald P. Aurillo
GERALD P. AURILLO
3332 N. Woodlawn Ave.,
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Metairie, Louisiana 70002
Attorney for Plaintiff,
Robert M. Dupas, Jr.